Rites and Wrongs: Anglican Ceremonies after Legal Weddings, 1837–57

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The Marriage Act 1836 marked an important change in the rites required for a valid marriage, allowing couples to marry in a register office or registered place of worship. For some, however, these unfamiliar rites did not constitute a marriage at all, and in the early 1850s a particular controversy emerged regarding Anglican clergymen who 'remarried' couples who had already been legally married under the 1836 Act. This article examines three cases of such 'remarriages' and how two of the clergymen involved subsequently found themselves facing prosecution. It analyses the circumstances in which a rite might become a 'wrong' in the eyes of the law and traces the impact of these cases on the development of a new provision governing when an additional religious ceremony could take place and, more unexpectedly, on the form of register office weddings.

Introduction

On the afternoon of 11 July 1856, a trial took place in Oxfordshire. The Rev. Richard Meux Benson, vicar of Cowley, was charged with conducting a ceremony of marriage in contravention of the Marriage Act 1823, banns not having been called nor a licence obtained to authorize it. The reason he had omitted these legal preliminaries was a simple one. The couple in question, Richard Pinnell Carey and Sarah Carey, were already married to each other, their legal wedding having taken place at the register office in Oxford in May 1852. Indeed, this earlier ceremony was the very reason that this prosecution was being brought. In the words of the counsel for the prosecution, conducting a second ceremony of marriage for couples who were already married was 'calculated to throw doubt' on the validity of the first ceremony 'and to create misgivings in the mind of those who previously had no doubt as

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to the soundness of their position'. The prosecution had therefore been 'instituted by the Attorney-General with a view to the purposes of public justice; and in order that the law might be established on a subject so important as that of matrimony'.[1]

This article examines why Benson (who was not the only Anglican clergyman to conduct such remarriages) found himself facing trial,[2] the outcome of the case and its legacy in determining the circumstances in which an Anglican ceremony could be performed after a legal wedding. To this end, it explains first how the option of getting married in a register office had been introduced by the Marriage Act 1836, along with that of being married in a non-Anglican place of worship, and how these new options were regarded by contemporaries. The second part then explores why the practice of 'remarrying' couples who had already been legally married under the 1836 Act emerged as a particular topic of controversy in the early 1850s. Along with Benson, two other examples of 'remarriage' attracted attention. These were ceremonies conducted by the Rev. William Bennett, vicar of Frome in Somerset, and the Rev. Alfred Lush, curate at Greywell in Hampshire. The accounts of these cases suggest that these men were conducting these ceremonies for religious reasons rather than because they had any doubts as to the legal validity of marriages conducted under the 1836 Act. For legal purposes, however, their motivations were less important than their actions and Lush (but not Bennett) also found himself facing prosecution. The third part examines the course of the proceedings against Benson and Lush and the outcomes in each case. The final part traces the impact of these cases on the inclusion of a specific provision in the legislation governing marriage, setting out when an additional religious ceremony may take place after a legal wedding, and the cases' unexpected impact on the form of the ceremonies that could be conducted in register offices. It concludes by considering the longer-term implications of this particular controversy, and the questions that it raises for future research into the religious allegiances of those who married in Dissenting places of worship and register offices.

[1] 'R *v.* Benson (Clerk)', *The Times*, 12 July 1856, 11.

[2] Somewhat surprisingly, there is no mention of the trial in M. V. Woodgate, *Father Benson: Founder of the Cowley Fathers* (London, 1953) or any of the essays in Martin L. Smith, ed., *Benson of Cowley* (Oxford, 1980), nor in Smith's *ODNB* entry on him (Martin L. Smith, 'Benson, Richard Meux [1824–1915]', *ODNB*, online edn [2004], at: < https://doi.org/10.1093/ref:odnb/30717>).

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The Marriage Act 1836: Introducing Alternatives to the Anglican Rite

The Marriage Act 1836 had marked an important change in the rites required for a valid marriage. Previous legislation had required all marriages save those of Quakers and Jews to be solemnized according to Anglican rites.[3] From the early nineteenth century, however, there were objections from the Unitarians about the necessity of 'submission' to those rites,[4] and over the course of the next twenty years lawmakers sought to find a way of providing an acceptable alternative.[5] By 1833 the Protestant Dissenting Deputies had added their weight to the calls for reform, with 'compulsory conformity to the Rites and Ceremonies prescribed by the Book of Common Prayer for the Celebration of Matrimony' heading the list of their grievances.[6]

The solution eventually adopted in the 1836 Act was to provide two new ways of getting married. The first was the option of getting married in a certified place of worship that had been registered for weddings.[7] The second (and even more novel) option was that of getting married in the office of one of the new superintendent registrars.[8]

Both these options required a civil registrar to be present to register the marriage.[9] For a wedding in a register office a superintendent

[3] Clandestine Marriages Act 1753 (26 Geo. II c. 33), replaced by the Marriage Act 1823 (4 Geo. IV c. 76). See also Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge, 2009).

[4] See, for example, the petition from 'several Unitarian Christians of Kent and Sussex' setting forth how such submission in essence acknowledged the authority of the established church 'to decree rites and ceremonies' and therefore violated the Unitarians' 'leading principle of dissent': *JHC* 72, 466 (8 July 1817). See also, in this volume, David L. Wykes, 'The Early Nineteenth-Century Unitarian Campaign to change English Marriage Law', 289–311.

[5] See Rebecca Probert, *Tying the Knot: The Formation of Marriage, 1836–2020* (Cambridge, 2021), 24–36.

[6] London, Guildhall Library, MS 03083, Minutes of the Protestant Dissenting Deputies, vol. 8, 15 March 1833, 156. A United Committee was appointed to consider these grievances which, in addition to representatives from each of the Protestant Dissenting Deputies, included the General Body of the Protestant Dissenting Ministers of the Three Denominations, the Protestant Society and the United Associate Presbytery of the Secession Church of Scotland: Guildhall Library, MS 03086, Minute Books of a committee called the United Committee appointed to consider the Grievances under which Dissenters now labour, vol. 1, 1834–5.

[7] Marriage Act 1836, §20.

[8] Marriage Act 1836, §21.

[9] Marriage Act 1836, §§20, 21.

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registrar had also to be present, although the role they were to play was not specified.[10] Moreover, both options allowed for a wedding to be conducted either with or without any religious content. Weddings in a registered place of worship could be conducted 'according to such Form and Ceremony' as the parties saw 'fit to adopt'.[11] There was no legal requirement that this must be a religious ceremony, nor that it should be led by a Dissenting minister or a Catholic priest.[12] Conversely, there was no legal prohibition on religious content being included in a register office wedding, and contemporary evidence confirms that some were accompanied by prayers and Bible readings.[13] For both forms of ceremony, the only requirement was that certain prescribed words should be said.[14] While the prescribed declarations and vows were closely modelled on the Anglican marriage service, the excision of any references to a deity meant that there was nothing that would be objectionable to the parties, regardless of their religious allegiances or lack thereof.

For some, however, these unfamiliar and potentially entirely secular rites did not constitute a marriage at all. On 1 July 1837, the day that the new Act came into force, the *Yorkshire Gazette* inveighed against the fact that the pared-down rites required by the law contained no pledge by the parties to love and cherish each other or live together forever and argued that '[i]f such a contract be anything better than a gipsey marriage, which is but a mutual engagement for a brief term of years or during pleasure, it is at least proper that the parties entering into it should at the time be reminded of all its ties, duties, and responsibilities, by some explicit and impressive form of words'.[15] A couple of months later, *The Times* noted approvingly that the *Dorsetshire Chronicle* had 'adopted a very judicious mode of distinguishing these nondescript semi-marriages from the good old marriages proper' in its announcements columns, placing the former 'not in the ordinary list of "MARRIED", but in a separate paragraph, and

[10] Marriage Act 1836, §21.
[11] Marriage Act 1836, §20.
[12] Cf. Lawrence Stone, *Road to Divorce: A History of the Making and Breaking of Marriage in England* (Oxford, 1995), 133, who mistakenly contrasts the possibility of marrying in 'a sacred religious ceremony conducted by a minister in holy orders in a church or chapel' with the 'purely secular contract' that was 'conducted by a state official in an office'.
[13] See Probert, *Tying the Knot*, 73–4.
[14] Marriage Act 1836, §20.
[15] *Yorkshire Gazette*, 1 July 1837, 2.

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under a more appropriate head, viz, "UNITED under the Act 6 and 7 William IV., c. 85".'[16] Reviewing the limited take-up of the new Act the following year, the *Halifax Guardian* rejoiced in the absence of demand for register office ceremonies in the town, commenting that 'the female who is united after such a *form* … is no more a wife than is one of the same sex in the less senseless and less licentious tribe of monkies'.[17]

Some Anglican clergymen preached sermons against the new Act and in particular against the idea of being married without religious rites. As the Rev. William Bennett, then minister of Portman Chapel, asked his hearers:

> When she, who is to be for ever the companion of our journey through life … is made ours, shall we be content to stand before man as the only witness, and thrust aside God? Shall we go before a magistrate, or a registrar, and despise the minister of the Lord Jesus Christ? Shall we send forth no aspirations to the throne of grace, that what is commenced in this world may have its reference and conclusion in the next? God forbid.[18]

More widely reported was the sermon preached by the rector of South Hackney, Henry Handley Norris. In arguing that marriage was a divine institution, Norris urged his hearers to shun the new forms that allowed 'holy matrimony' to be 'superseded by a coupling together which, upon scriptural principles, can be regarded only as a legalized concubinage'.[19]

While the new forms of marriage had their supporters,[20] given these objections it would have been natural for some of the couples marrying under the 1836 Act to feel a few qualms about the status of their union. After all, as Norris had reminded his hearers, the previous similar 'desecration' of the marriage rite – the introduction of civil

[16] *The Times*, 2 September 1837, 4.
[17] Reprinted in 'The Dissenters and the New Marriage Act', *Morning Post*, 14 September 1838, 2.
[18] William J. E. Bennett, *New Marriage Act: Three Sermons on Marriage, with Reference to its Divine Appointment* (London, 1837), quoted in the review in the *Church of England Quarterly Review* 1 (1837), 573–4, at 574.
[19] 'The Rector of South Hackney and the New Marriage Law', *Morning Chronicle*, 9 September 1837, 3; see also *Sheffield Independent*, 16 September 1837, 2.
[20] See, for example, *Bristol Mercury*, 5 August 1837, 4; *Sheffield Independent*, 16 September 1837, 2.

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marriage during the Commonwealth – had lasted for only a brief period before being repealed.

Such qualms led some couples who had married in a register office or a non-Anglican registered place of worship to go through a second ceremony of marriage in an Anglican church. As early as 1842, Burn's *Ecclesiastical Law* noted that '[s]ince the passing of the Registration Acts, it has frequently happened that parties, united according to their provisions, have subsequently desired to be married according to the rites of the church', and set out the form of affidavit that had been adopted by the office of the Master of the Faculties to deal with this contingency. In this affidavit the husband swore that he had, in accordance with the Marriage Act 1836, 'contract[ed] and solemnize[d] marriage in a certain registered building … in the presence of the … registrar' but that 'to obviate all doubts which may arise touching the validity of such marriage, and for the greater facility of proof thereof, [they] are desirous of being re-married in the parish church'.[21] It hardly needs to be pointed out that this phrasing would have done little to reassure Dissenters that the Church of England respected their weddings.

When a Rite might become a Wrong

It is therefore somewhat surprising that it was only in the 1850s that any attempt was made to check this practice. A clue as to why remarriages became an issue at this point may lie in the fact that one of the clergymen involved, William Bennett, had become controversial for other reasons. As the incumbent of the church of St Barnabas in the parish of St Paul's, Knightsbridge, his adoption of certain high church rituals had generated controversy,[22] leading to riots, and he had been asked to resign.[23] His subsequent appointment as vicar of Frome St John had even prompted a lengthy debate in parliament.[24]

[21] Richard Burn and Robert Phillimore, *Ecclesiastical Law*, 9th edn, 4 vols (London, 1842), 2: 433.

[22] The rituals in question included 'chanting, genuflecting, bowing to the high altar, and the use of surplices': Dominic Janes, *Victorian Reformation: The Fight over Idolatry in the Church of England, 1840–1860* (Oxford, 2009), 66.

[23] See Walter Ralls, 'The Papal Aggression of 1850: A Study in Victorian Anti-Catholicism', *ChH* 43 (1974), 242–56.

[24] Parl. Deb. (3rd series), 20 April 1852 (vol. 120, cols 895–941).

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In 1853, Bennett conducted an Anglican ceremony for William and Caroline Burton, who had previously married at Badcox Meeting House, a Baptist chapel in Frome.[25] The following year, a second couple, William and Elizabeth Dimmock, were also remarried at Frome St John, having previously married at Frome's Zion Chapel. The ceremony in this case was conducted by Bennett's curate. It was this latter remarriage that seems to have attracted public attention and criticism, with allegations being made that the couple in question had been pressurized into it.[26] A public meeting of Protestants 'of all denominations' was held,[27] at which it was resolved that 'the remarriage of persons already united in matrimony is a violation, or, at least, an evasion of the law of the land', and further that 'it forms part of a system designed to set up ecclesiastical arrogance against civil authority'.[28] Other commentators similarly made an explicit link between such remarriages and Bennett's propensity for the Oxford Movement, with the *Western Times* claiming that '[t]he Tractarians want to teach the people that marriage is a sacrament of the church, and that no marriage can be valid unless it be solemnized by a priest'.[29]

That, however, somewhat misrepresented Bennett's views. In his sermons he 'commends the freedom given in the case of those external to the Church, but points out that marriage has always been a religious matter, and speaks powerfully against *members of the Church* being married without her blessing'.[30] While there is scope for debate as to who counts as a 'member' of the Church of England,[31] it is worth noting

[25] It had been one of the first to be registered for weddings, in August 1837: *London Gazette*, 29 August 1837, 2284.

[26] According to the *Western Times*, 3 June 1854, 5, the 'chief agents' in this 'base business' were the 'Sisters of Mercy' who 'visit the houses of the poor Dissenters, charge them with not being married, that they are living in fornication, that their offspring are not legitimate, and that, if the children of such die unbaptized, they must go to hell.'

[27] 'Great Protestant Meeting at Frome', *Leeds Times*, 3 June 1854, 2.

[28] *Leicestershire Mercury*, 3 June 1854, 4.

[29] *Western Times*, 3 June 1854, 5.

[30] F. Bennett, *The Story of W. J. E. Bennett: Founder of St Barnabas', Pimlico, and Vicar of Froome-Selwood and of his Part in the Oxford Church Movement of the Nineteenth Century* (London, 1909), 257 (emphasis added).

[31] See, for example, Clive Field, *Periodizing Secularization: Religious Allegiance and Attendance in Britain, 1880–1945* (Oxford, 2019), 25, who calculates the Church of England community as being constituted by 'the vast residue of people left following subtraction from the whole population of the number of non-Anglicans: Dissenters, Roman Catholics, Jews, and what would now be termed religious "nones".'

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that both the Burtons and Dimmocks went on to have their children baptized according to Anglican rites.[32] Indeed, at least five of the Dimmocks' children were baptized by Bennett himself, including their eldest daughter, Mary Jane, whose baptism took place just a few weeks after her parents' remarriage.

Nonetheless, the issue of the Dimmocks' remarriage was raised in parliament.[33] In the opinion of the ecclesiastical judge Dr Addams, however, Bennett had done nothing wrong and was indeed under a duty to conduct the marriage ceremony for any of his parishioners who, 'having scruples about the validity of their union before the registrar', applied to him 'to solemnize their marriage *facie ecclesiae*'.[34] There was, after all, nothing in the Marriage Act 1836 precluding the Church of England rite's being performed after a valid wedding in a registered place of worship or register office. Nor was there any scope for a prosecution to be brought in relation to the way in which the ceremony had been conducted, since all the regulations governing Church of England weddings had been punctiliously observed in both cases. Banns had been called in both cases, with the wife being given her married name rather than her maiden name.[35] The 'remarriages' had also been recorded in the parish register, and again, in each case, the wife had been recorded with her married name. Moreover, under the heading 'condition' the previous legal wedding had been noted, although here there was a small but telling difference between the two cases. While the Burtons were recorded as having been 'previously *married* at Badcox Meeting House',[36] the Dimmocks were described as 'previously *united* at Zion Meeting

[32] Taunton, Somerset Heritage Centre, Somerset Parish Records 1538–1914, D\P\fr.jo/2/1/10, Frome St John, Baptisms 1846–1864, 149 (Mary Jane [Dymock]), 168 (Joseph Burton), 285 (Walter Dimmock); D\P\fr.c.c/2/1/1, Frome Christ Church, Baptisms 1844–1863, 60 (William Dimmock); D\P\fr.h.t/2/1/3, Frome Holy Trinity, Baptisms 1853–1860, 97 (Emily and Albert Dimmock); D\P\fr.jo/2/1/11, Frome St John, Baptisms 1864–1889, 14 (Edward Dimmock), 45 (Bessie Dimmock), 67 (Lucy Dimmock), 98 (Minnie Dimmock), 136 (Arthur Dimmock).

[33] *Bristol Mercury*, 24 June 1854, 2; *Morning Chronicle*, 11 July 1854, 2. Unfortunately the discussion referred to does not appear in *Hansard*.

[34] Opinion of T. Addams, Doctors Commons, 8 June 1854, cited by the archdeacon of Cornwall and reported by the *Royal Cornwall Gazette*, 6 June 1856, 6.

[35] Somerset Heritage Centre, Somerset Parish Records, D\P\fr.jo/2/2/4, Frome St John, Banns Book, 1837–1856, nos 586, 615.

[36] Ibid., D\P\fr.jo/2/1/25, Frome St John, Marriage Register, 1852–1866, 39 (no. 78; emphasis added).

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House'.[37] The use of the word 'united' sidestepped the question of whether this constituted a marriage and may explain why the Dimmocks' case had generated a more hostile reaction than that of the Burtons. Nonetheless, it provided no ground for a prosecution.

Without any means of proceeding against Bennett, those who wished to emphasize the legitimacy of marriages conducted under the 1836 Act had to look elsewhere. It was against this backdrop that the actions of Benson attracted attention. Benson was a far less well known (and certainly less controversial) figure than Bennett.[38] At the time of the events in question he was in his early thirties, having been ordained in 1849 and appointed as vicar of Cowley in 1850. The ceremony that was to lead to his prosecution had taken place on 3 May 1855. As noted in the introduction, Richard and Sarah Carey had been married at the Oxford register office some three years earlier. The reason for this relatively belated remarriage was that Sarah had asked to be churched after the birth of her children. Benson, according to the subsequent court case, had 'objected to perform the ceremony on the ground that the way in which she had been married was not right in the sight of God, and not in accordance with the religion of the Church of England'.[39] As Sarah herself later told the court, Benson had told her that the register office wedding 'was perfectly legal, but that it was a right and proper thing to have the blessing of the church upon our union, and that that was the object of reading the service in church'.[40]

It was understandable that Benson might take the view that there was no need to call banns or for the parties to obtain a licence if the Anglican rite was being performed purely for religious purposes. It was equally clear that the Registrar-General, George Graham, was keen to make an example in order to dispel any doubts anyone might have about the status of ceremonies conducted under the

[37] Ibid., no. 110 (emphasis added).

[38] While Benson has attracted scholarly attention (see the sources in n. 2 above), the focus has been on his later life and work, in particular his role in founding the Society of St John the Evangelist, his advocacy of retreats and his missionary work: Mark Gibbard, 'R. M. Benson, the Founder of SSJE', *Theology* 69 (1966) 194–201; John Tyers, 'Not a Papal Conspiracy but a Spiritual Practice: Three Early Apologists for the Practice of Retreat', *Journal of Anglican Studies* 8 (2010), 165–83; Rowan Strong, 'Origins of Anglo-Catholic Missions: Fr Richard Benson and the Initial Missions of the Society of St John the Evangelist, 1869–1882', *JEH* 66 (2015), 90–115.

[39] 'R *v.* Benson (Clerk)', *The Times*, 12 July 1856, 11.

[40] Ibid.

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1836 Act. In a letter of 10 January 1856, he stated that he had received many complaints that Anglican clergy were in the habit of informing couples who had married in a register office that their marriage was not binding. Noting that since the passage of the 1836 Act nearly six hundred thousand persons would have been married according to its terms, he added: 'It appears to me very reprehensible that clergymen, because the marriages have not been solemnized in Parish Churches according to the rites of the Established Church to which they belong, should be so bigoted as to consider it right thus to disturb the minds of parties so married, inducing them to doubt whether they have not been living in fornication and whether their issue be illegitimate.'[41] To address this, he suggested that Benson should be prosecuted under the 1823 Act, which continued to govern the conduct of Church of England weddings. This Act had provided that if any person solemnized a marriage 'without due publication of banns' or the grant of a licence, 'every Person knowingly and willfully so offending, and being lawfully convicted thereof, shall be deemed and adjudged guilty of Felony, and shall be transported for the Space of Fourteen Years.'[42]

The Protestant Dissenting Deputies were also on the look-out for a possible case to prosecute, specifically one in which an Anglican ceremony had taken place after a ceremony in a registered place of worship. On 7 February 1856, at their annual meeting in London, it was reported that '[t]here had been several instances of clergymen re-marrying parties who had been married under the new act – one at Frome, one in Wiltshire, one in Oxfordshire, and one in the north of England.' Having sought legal advice as to the case in Wiltshire, the committee had been advised that it was 'an indictable offence entailing the penalty of fourteen years transportation'.[43]

It seems likely that the case they had in mind was that of the Rev. Alfred Lush.[44] Lush was the curate of St Mary's Church in Greywell, a small chapelry annexed to the living of Odiham (Hampshire), with a population of around three hundred. In 1855, he had conducted a ceremony of marriage for Francis Freeman and Sarah Rogers, who

[41] Kew, TNA, HO45/6357.
[42] Marriage Act 1823, §21.
[43] *Daily News*, 8 February 1856, 6.
[44] While Lush was based in Hampshire, not Wiltshire, all other facts fit and no Wiltshire case has been traced.

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had married in the Independent chapel in the district the year before. His explanation (and excuse) was that the couple had asked to be remarried in church following doubts expressed by neighbours about the validity of their marriage.[45] He also pointed out that they were both regular communicants and had only married in the Independent chapel to escape the notice of nineteen-year-old Sarah's parents. Nonetheless, as with Bennett, his actions seem to have occasioned some ill-feeling locally, and in December it was reported that Dissenters in Greywell had 'got up a public meeting to censure the conduct of the Rev. Mr. Lush'.[46]

The legal case against Lush was slightly different from that against Benson. While Benson had conducted a ceremony without first calling banns, Lush had called the banns for the remarriage of Francis and Sarah Freeman. The issue was that they had been called in the maiden name of the wife rather than her married name. For Dissenters, this was tantamount to ignoring the existence of the first marriage and, as the *Berkshire Chronicle* reported, they had 'expressed their grievances in very audible terms'.[47] Legally, the key point was that it could be argued that there had not been 'due' publication of banns if they had not been called in the wife's true name. As a result, Lush was charged with the same offence as Benson and faced the same potential penalty. The second charge against him also related to the names that had been used, in that the marriage had been registered in the wife's maiden name and the parties had been described as 'bachelor' and 'spinster'.[48] He was therefore charged also with making a false entry in the marriage register, potentially an even more serious offence, carrying the penalty of transportation for life.[49]

The Legal Outcomes

Preliminary steps were taken against both Lush and Benson in the early months of 1856. Lush appeared at the petty sessions in Odiham in February, where the charges against him were read and

[45] 'The Re-Marriage Case at Greywell', *Berkshire Chronicle*, 1 December 1855, 6.
[46] *Manchester Courier and Lancashire General Advertiser*, 8 December 1855, 5.
[47] 'Re-Marriage Case at Greywell'.
[48] Ibid; see also *Morning Post*, 13 February 1856, 4; *Berkshire Chronicle*, 16 February 1856, 6.
[49] Marriage Act 1823, §29.

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he was committed for trial.[50] A true bill was returned against him at the Hampshire Spring Assizes but the trial was removed to the Queen's Bench by a writ of certiorari.[51] Benson, meanwhile, was committed for trial at the Oxford Assizes.[52]

However, Lush's case never came to trial. As the *Berkshire Chronicle* subsequently reported, the case against him had been withdrawn by the prosecution upon his making a full apology for his actions, the terms of which it reprinted for the benefit of its readers:

> To the Committee of the Deputies of Protestant Dissenters of the Three Denominations, Presbyterian, Independent, and Baptist, appointed to protect their Civil Rights. GENTLEMEN, Prosecution has been instituted against me for having by my proceedings in the Re-marriage Case at Greywell, cast a doubt upon the validity of Marriages before the Superintendent Registrar, or, as in the particular case at Greywell, before the Registrar in a dissenting place of worship, registered for solemnizing marriages therein.
>
> I consider that in a religious point of view all Church people ought to receive the blessing of the Church upon their marriages, and I acted honestly and conscientiously in carrying out that view, and certainly had no intention or idea of violating the two Acts of Parliament under which I have been indicted.
>
> I however, now, after taking the advice and counsel of those whose opinions I most highly value, am persuaded that I erred in re-marrying those parties as if the previous marriage were not valid, and so gave just cause of offence, which I much regret.
>
> I think now and hereby declare for your satisfaction, that Marriages before the Registrar in a dissenting place of worship registered for solemnizing marriages therein, or before the Superintendent Registrar, are not only legally valid (which I never questioned), but also binding in the sight of the Church.
>
> I am, Gentlemen, your obedient Servant, ALFRED LUSH. Greywell, 1st July, 1856.[53]

[50] *Morning Post*, 13 February 1856, 4.
[51] *Berkshire Chronicle*, 8 March 1856, 4–5; *Reading Mercury*, 8 March 1856, 8.
[52] *Morning Post*, 25 February 1856, 6.
[53] *Berkshire Chronicle*, 23 August 1856, 5.

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Ten days later, Benson's trial at the Oxford Assizes took place. Yet despite the confident assertion of counsel for the prosecution that this was a matter of considerable public importance, it was difficult for him to identify any convincing reasons as to why it was problematic that the preliminaries had not been observed in this case. While he urged the importance of the banns being properly published to enable parents or guardians to prevent 'improper' marriages, this had no application to a couple who were already married. Even more tenuous was his argument that the certificate of the later marriage might be used in a court of law as evidence that the children born after the first ceremony but before the second were in fact illegitimate and 'so might lose the property which would otherwise be secured to them'. His argument that matters of property might also be at stake if it were to turn out that the first marriage was in fact invalid for some reason could be seen as an argument *for* remarriages rather than against them.[54]

In Benson's defence, it was simply argued that the case was not within the 'mischief' of the statute, for the simple reason that it referred to a marriage being 'solemnized', and a marriage could not be solemnized between parties who were already married to each other.[55]

The sympathies of the presiding judge, Baron Alderson, were clear from the outset. Indeed, he appears to have treated the case as something of a joke. The account of the trial in *The Times* is punctuated by notes of the laughter in court in response to his wisecracks. Upon the superintendent registrar giving evidence that the notice of the original register office marriage had been displayed in his office for twenty-one days, Alderson sarcastically commented '[a]nd the office is shut all the time', and later suggested that it would be no bad thing if the registrar was to be transported for fourteen days. He accepted the argument of the defence that Benson had not actually 'solemnized' a marriage within the terms of the 1823 Act:

> When it said that, if any person should solemnize matrimony, without due publication of ban[n]s, he should be guilty of felony, the meaning was, that if any person should do an act which changed the status of the parties from being unmarried to that of being married, and did that

[54] 'R *v.* Benson (Clerk)', *The Times*, 12 July 1856, 11.
[55] Ibid.

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> without the due publication of ban[n]s or license, he should be guilty of felony, and transported for 14 years. … In the present case Mr. Benson read the service between two persons who were already man and wife, and he could not marry them clandestinely, so that the act had no application to him.[56]

As he joked, if Benson 'had read *Chevy Chase* over to them, it would have had the same legal effect, though the effect upon their consciences would have been different'. Yet at the same time he also made it clear that he did not endorse Benson's conduct, noting tartly that '[i]f Mr. Benson had consulted his wisdom he would have applied to his bishop' and in so doing would have 'received a strong remonstrance against his unwiseness'.[57]

The Legal Legacy

If Benson was acquitted, and Lush was never prosecuted, did that mean that there was nothing wrong in conducting an Anglican ceremony of marriage for a couple who were already validly married under the Marriage Act 1836? Here matters get a little more complicated.

At the same time that the charges against Lush and Benson had been made, parliament had been considering a bill to reform the law of marriage and address various grievances identified by the Protestant Dissenting Deputies.[58] There was nothing about remarriages of this kind in the original drafts of any of the bills that led up to the 1856 Act. On the third reading of the 1856 bill, however, a clause was added that seemed to have the cases of Lush and Benson in mind.

The third reading of the bill took place in the early hours of the morning of 1 July 1856. This can be ascertained because the time was recorded in the *Journals of the House of Commons*.[59] Ascertaining what was said is more of a challenge. No report of the debate appeared in the newspapers, and no debate was recorded in

[56] Ibid.
[57] Ibid. The bishop in question was Samuel Wilberforce, bishop of Oxford. For an account of Wilberforce's lack of sympathy with the Tractarians, see Standish Meacham, *Lord Bishop: The Life of Samuel Wilberforce, 1805–1873* (Cambridge, MA, 1970).
[58] Probert, *Tying the Knot*, 85–91.
[59] *JHC* 111, 310 (1 July 1856).

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Hansard. Nonetheless, in the version of the bill that was sent to the House of Lords later that day there was a new clause. It provided that the parties 'to any Marriage contracted before the Registrar' could, if they so wished, have a religious ceremony afterwards but that 'nothing in the Reading or Celebration of such Service shall be held to supersede or invalidate any Marriages previously contracted'.[60]

The reference to weddings 'before the Registrar' covered those in registered places of worship as well as those in the register office. While the clause was couched in permissive terms, it was clearly intended (and seen) as a rebuke to individuals such as Bennett, Benson and Lush. This can be seen from the reaction in the Liberal *Bradford Observer*, which exulted that it put 'an effectual stop … to the re-marriages by which the Tractarian clergy have striven to cast a slur upon the civil contract and upon marriages lawfully solemnized in registered buildings'.[61] The message was that clergy should not cast any doubt on the validity of marriages that had been duly solemnized under the Marriage Act 1836.

It is unlikely to be a coincidence that it was on that very same day, 1 July, that Lush penned his apology for his actions. By 1856, lines of communication were well established and swift: a letter bearing word of the new clause, posted in London on the morning of 1 July, would have reached Greywell by the afternoon; alternatively, though more costly, a telegram could have been sent via Odiham Post Office. It was subsequently reported that the case against Lush had been withdrawn.

It also seems unlikely that it was a coincidence that it was on 11 July that the Select Committee appointed to consider the bill met. The date was that of Benson's trial; the time, an hour earlier. As a result, there was no risk that the outcome of one could influence the other. Again, no report of any debate appears to exist, so the story has to be followed through the Minutes of the House of Lords and the various drafts of the bill. The committee revised the new clause so that it referred only to the possibility of having a religious ceremony after a wedding *in the register office*, rather than after *any* wedding before a registrar.[62] This suggests that they were aware of

[60] Marriage and Registration Acts Amendment Bill, 1 July 1856 (no. 205), cl. 12.
[61] *Bradford Observer*, 28 August 1856, 6.
[62] The Select Committee sat at 1 p.m.: *House of Lords Minutes of Proceedings*, 11 July 1856, 853. For the version of the bill as amended by the Select Committee, see

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Lush's apology and felt that there was no longer any need for the clause to include marriages in registered places of worship within its scope.

Had this provision in the 1856 Bill merely been intended to allow clergy to conduct a religious ceremony after a wedding in the register office, the outcome in Benson's case would have shown that it was unnecessary: he was, after all, acquitted of wrongdoing in exactly such an instance. But once it is understood as conferring permission to conduct a subsequent religious ceremony only in certain defined circumstances, and as an implied rebuke to any who might deny the validity of the earlier wedding, it still had a role to play. A further amendment clarified that any subsequent religious ceremony should not be entered in the marriage register.[63]

The final version of the Marriage and Registration Act 1856 provided that it was perfectly legitimate for any clergyman or minister of any persuasion to conduct a religious ceremony for a couple who had married in a register office as long as it was clear that it was the register office wedding that constituted the legal marriage. As it set out:

> If the Parties to any Marriage contracted at the Registry Office … shall desire to add the Religious Ceremony ordained or used by the Church or Persuasion of which such Parties shall be Members to the Marriage so contracted, it shall be competent for them to present themselves for that Purpose to a Clergyman or Minister of the Church or Persuasion of which such Parties shall be Members, having given Notice to such Clergyman or Minister of their Intention so to do; and such Clergyman or Minister, upon the Production of their Certificate of Marriage before the Superintendent Registrar, and upon the Payment of the customary Fees (if any), may, if he shall see fit, in the Church or Chapel whereof he is the regular Minister, by himself or by some Minister nominated by him, read or celebrate the Marriage Service of the Persuasion to which such Minister shall belong … but nothing in the Reading or Celebration of such Service shall be held to supersede or invalidate any Marriage so previously contracted, nor shall such

Marriage and Registration Acts Amendment Bill (no. 236). The committee included both the archbishop of Canterbury, John Bird Sumner, and the bishop of Oxford, Samuel Wilberforce.

[63] Marriage and Registration Acts Amendment Bill (no. 236).

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> Reading or Celebration be entered as a Marriage among the Marriages in the Parish Register.[64]

All this was clear enough, so far as it went. But the fact that the relevant section of the Act only said that those who had married in a register office could have a further religious ceremony raised the question of whether it was also permitted to conduct a further religious ceremony for a couple who had already had a religious ceremony in a registered place of worship. The ongoing discussion of Lush's case meant that this question was swiftly answered.

In January 1857, the newspapers reported that Lush's case had been discussed at the Annual Meeting of Protestant Dissenters, noting that the prosecution had been withdrawn on him making a full and public apology and paying the costs.[65] The necessity for the apology, or the formal withdrawal of the prosecution, baffled one reader, who wrote to the *Justice of the Peace* to ask: 'Now, Sir, how can this be? Has the judgment of Mr. Baron Alderson in Reg. v. Benson, Clerk, been overruled, or is it to be supposed that the attorney-general and also Mr. Lush's counsel were ignorant of that judgment?'[66] One obvious answer to this might be that Lush had made his apology before Benson's case, even if the formal withdrawal of the prosecution had happened afterwards. But the answer given in the *Justice of the Peace* was that the 1856 Act had altered the law. The reasoning was that the express permission to perform a subsequent religious ceremony where the marriage had been conducted at the register office 'tends to show that the performance of it in any other case would be unlawful'.[67]

This might seem to be a somewhat tenuous inference to draw. However, a further piece of evidence suggests that the redrafting of the clause on 11 July was indeed intended to exclude the option of conducting a second religious ceremony after a religious wedding in a registered place of worship. A subsequent addition to section 12 stipulated that 'at no Marriage solemnized at the Register Office of any District shall any Religious Service be used'. Again, there is no report of any debate on this change, but its addition to that specific section

[64] Marriage and Registration Act 1856, §12.
[65] *Morning Chronicle*, 10 January 1857, 3.
[66] *The Justice of the Peace, and County, Borough, Poor Law Union, and Parish Law Recorder* 21 (1857), 90 (7 February 1857).
[67] Ibid.

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only makes sense if the drafters were assuming that having two religious ceremonies was not an option. The option of marrying in a religious ceremony in a register office needed, logically, to be done away with, so that a distinct line could be drawn so far as the lawfulness of any subsequent religious ceremony was concerned. Had this option not been removed, there would have been the oddity of a subsequent religious ceremony being barred where the legal wedding had taken place in a registered place of worship but not where the couple had married in a register office with religious rites.

With a single stroke this recast marriage in the register office as a purely secular rite. No longer was it possible for a wedding to be celebrated in the register office with prayers or readings from Scripture, or even, in the account of one vicar, with a 'God bless you' from the registrar.[68] Given that many chapels remained unregistered, there would also have been many Dissenters who were unable to marry in their own place of worship but were opposed to the idea of marrying in a Church of England church. The effect of the new prohibition on religious content was to prevent them from having a wedding in the register office that reflected their beliefs, removing much of the flexibility that the 1836 Act had originally offered.[69] It was a hugely significant change.

Conclusion

The fact that action was taken against Benson and Lush, but not against Bennett, illustrated how the available criminal provisions were a very poor means of dealing with the particular harm of which the Registrar-General and the Protestant Dissenting Deputies complained. Focusing on whether the Anglican ceremony had been properly performed diverted attention from the motivations of the cleric performing the ceremony: performing a ceremony for a couple who had asked for the Anglican rite was very different from persuading a couple that they needed to go through a second religious ceremony, but in legal terms it was irrelevant to the issue to be decided.

[68] *Report of the Royal Commission on the Laws of Marriage*, Cm 4059 (London, 1868), Appendix, 20.

[69] See Rebecca Probert, 'Sacred or Secular? The Ambiguity of "Civil" Marriage in the Marriage Act 1836', *Journal of Legal History* 43 (2022), 136–60.

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The Marriage and Registration Act 1856 made it clear that there was nothing wrong in conducting a subsequent religious ceremony for couples who had married in a register office. Nonetheless, by framing this in permissive terms it left much else uncertain. As noted above, commentators inferred from its terms that couples could not have a subsequent religious ceremony after a religious wedding. However, it was a step too far to infer that the person conducting the ceremony was thereby guilty of a criminal offence without this being explicitly stated. Just seven years later, when Sir Morton Peto asked the government whether they would take action against a clergyman who had remarried a couple in church eight days after they had married in an Independent chapel, the response was that no offence had been committed.[70]

Similarly, although the 1856 Act had laid down particular conditions under which a religious ceremony could take place after a register office wedding, it had not said what the consequences would be if clergy failed to observe those conditions. One very obvious breach occurred when Archibald Primrose, fifth earl of Rosebery and future prime minister, married Hannah de Rothschild: their register office wedding was followed by a second ceremony at an Anglican church that was entered into the register, in apparent contravention of the terms of the 1856 Act.[71] The Registrar-General – doubtless influenced by the fact that the witnesses who had signed the register included the prime minister, the Prince of Wales and the duke of Cambridge – quickly came up with an explanation to counter any suggestion of wrongdoing.[72]

It is tempting to speculate on how things might have turned out had Lush not penned his letter of apology. It seems clear that he, like Benson, would have been acquitted of any offence under the 1823 Act on the basis that he too was not 'solemnizing' a marriage.[73] If he had not apologized, would the Select

[70] Parl. Deb. (3rd series), 27 July 1863 (vol. 172, cols 1465–6).
[71] 'Lord Rosebery's Marriage', *The Times*, 22 March 1878, 11.
[72] His explanation was that since both ceremonies took place on the same morning, they 'would be held to constitute one marriage', and so 'the officiating minister did nothing illegal in registering the marriage in the usual way': 'Church News', *The Graphic*, 6 April 1878, 347.
[73] The reasoning in Benson's case would also apply to the charge of making a false entry in the register, since the relevant section referred to this being done with '[i]ntent to elude the Force of this Act': Marriage Act 1823, §29.

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Committee have left the clause as originally drafted, with its reference to marriages before the registrar? Had they done so, it would have been clear that it was perfectly acceptable to have a further religious ceremony after a religious wedding and there would have been no need to add the prohibition on the use of religious content in weddings in a register office. The experiences of subsequent generations of couples marrying in the register office – and, later, on approved premises – would have been very different.[74]

Finally, it is worth reflecting on the couples whose remarriages were conducted by Bennett, Benson and Lush. Their stories raise some difficult questions about the religious affiliations of those who married in Nonconformist chapels or in register offices during the mid-nineteenth century. As we have seen, the Burtons and the Dimmocks had their children baptized in the Church of England; the Freemans had married in an Independent chapel for tactical reasons; and Sarah Carey told the court that she and her husband 'were always members of the church of England'.[75] The puzzle in this last case is not why they went through with the Anglican ceremony but why they married in the register office in the first place. Even more importantly, their case casts doubt on whether it is valid to draw wider inferences about the rejection of religion from the popularity of register office weddings.[76] At the very least, we should be open to the possibility that it was the second, legally ineffective religious ceremony that was the more meaningful rite for some couples.

[74] On the restrictive nature of the current law, see Stephanie Pywell and Rebecca Probert, 'Neither Sacred nor Profane: The Permitted Content of Civil Marriage Ceremonies', *Child and Family Law Quarterly* 30 (2018), 415–36.

[75] Their son William was baptized in St James, Cowley, in August 1853: Oxford, Oxfordshire Family History Society, Anglican Parish Registers, BOD75_c_2, Cowley St James, Baptisms 1853–1892, 35.

[76] On which, see Olive Anderson, 'The Incidence of Civil Marriage in Victorian England and Wales', *P&P* 69 (1975), 50–87; Roderick Floud and Pat Thane, 'Debate: The Incidence of Civil Marriage in Victorian England and Wales', *P&P* 84 (1979), 146–54; Olive Anderson, 'The Incidence of Civil Marriage in Victorian England and Wales: A Rejoinder', *P&P* 84 (1979), 155–62. For more recent analysis of the range of reasons why couples might marry in a register office, see Rebecca Probert 'Interpreting Choices: What can we infer from where our Ancestors Married?', *Journal of Genealogy and Family History* 5 (2021), 75–84.

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